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No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Respondent.

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the United States Constitution compels the conclusion that a warrant which bore no relationship to the serach conducted by the police officers, and which wholly failed to meet the particularity requirement of the constitution, is invalid.

2. Whether the exclusionary rule should apply to evidence obtained under a search warrant that was plainly defective in totally failing to describe the items to be seized under circumstances in which both the issuing judge and the police officers who excecuted the warrant knew that it was defective.

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No. 82-963

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OSBORNE SHEPPARD,
Respondent

On Writ of Certiorari to the
Supreme Judicial Court for the
Commonwealth of Massachusetts

BRIEF FOR THE RESPONDENT

Prior Proceedings

On May 14, 1979, a grand jury sitting in Suffolk County, Massachusetts returned an indictment charging the respondent, Osborne Sheppard, with murder in the first degree (Joint Appendix 8a). Prior to trial, Sheppard moved to suppress certain physical evidence seized by the police pursuant to a warrant issued by a

judge of the Roxbury District Court (J.A. 10a). After a hearing, the court denied the motion to suppress (J.A. 19a).

At trial, a jury found the defendant guilty of murder in the first degree, and he was sentenced to life imprisonment (J.A. 6a).

On appeal, the Supreme Judicial Court of Massachusetts reversed the defendant's conviction, holding that the warrant violated the constitutional and statutory requirements that search warrants describe with particularity the things to be seized[1] and that "the

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[1]The court's conclusion was based on the Fourth Amendment, Article XIV of the Declaration of Rights of the Massachusetts Constitution ("special designation of the persons or objects of search, arrest, or seizure"), and the Massachusetts statute governing the issuance of search warrants, Mass. Gen. Laws c. 276, §2 ("Search warrants shall designate the building...to be searched and shall particularly describe the articles to be searched for").

exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant." Commonwealth v. Sheppard, 387 Mass. 488, 489 (1982)(J.A. 41a).[2]

STATEMENT OF FACTS

In the early morning hours of Saturday, May 5, 1979, the body of a woman, later identified as Sandra B. Boulware, was discovered in a vacant field in the Roxbury section of Boston. It was the tenth of a series of murders of women, most of which had taken place in Roxbury

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[2]The court did not consider whether the evidence should be suppressed pursuant to the laws of Massachusetts (J.A. 60a). Although the Supreme Judicial Court has never held that Article XIV or M.G.L. c. 276, §2 require suppression of evidence obtained in violation of their provisions, Commonwealth v. Sheppard, supra, that issue has been raised in two cases which are now sub judice in the Massachusetts court. Commonwealth v. Upton, Mass. S.J.C. No. 2941 (argued Sept. 12, 1983), and Commonwealth v. Nowells, Mass. S.J.C. No. 320 1 (argued Sept. 12, 1983).

(Tr. 2:171). The murders had received a great deal of attention from the news media, and there was considerable public interest in the police handling of the cases (Tr. 2:172). The Police Commissioner and the District Attorney were personally involved and both had arrived at the scene of the discovery of the body (Tr. 2:170, 244). Police officers assigned to the case were working overtime from the outset (Tr. 2:172-173).

The investigation soon focused on Osborne Sheppard, who had been seen with the victim four days before her body was discovered. He was brought to the District 2 police station for questioning on Saturday afternoon and was then released.

On Sunday morning, after further investigation, Sergeant Bornstein and Detective O'Malley, the officers in charge

of the investigation, met with the District Attorney at the District 2 police station in Roxbury to discuss the case. They decided at that time to seek a warrant for the arrest of Osborne Sheppard and a warrant authorizing the search of his residence at 42 Deckard Street in Roxbury. Detective O'Malley then prepared an affidavit in support of the application for the warrants. He showed the affidavit to the district attorney and to Paul Buckley, the first assistant district attorney, who reviewed it. The factual recitation in the affidavit stated that:

> I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (if space is insufficient, attach affidavit or affidavits hereto). On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Ware was found beaten and burned to death opp. 28 Hazelwood St. rox. In a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation this followed. It was deter-

mined that one Osborne Sheppard 42 Deccard St. Rox. was the last person to have been seen with Sandra. In an interview gave to Sgt. Bornstein, O. Sheppard stated that he and Sandra went to Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickle bags of herb and a fifth of Ameretto liquor. Officers in this investigation had established that O.Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found and that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his taken possession, also in the trunk of this car were found various pieces of wire and rope that may have been used to bind parts of her body, pieces of wire he found on the body. O. Sheppard has told McKinnley Grimfs, a friend, that in the past he was taken woman friends to his cellar at 42 Deckard St. for social purposes, and has worked on the cellar to make it comfortable.

Based upon the foregoing reliable information - and upon my personal knowledge and belief - and attached affidavits - there is probable cause to believe that property herein after described - has been stolen - or is being concealed, etc. and may be found in the possession of OSBORNE SHEPPARD at premises 2nd floor at 42 Deckard St. Roxbury.

(J.A. 14a-15a)

The warrant application made the following request for authorization to search:

> The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible). A fifth bottle of Ameretto Liquor, 2 nickle bags of marijuana, a womans jacket that has been described as black-grey (charcoal) possessions of Sandra D. Boulware, similar type wire and rope that match on the body of Sandra D. Boulware, or in the above thunder-bird. Blunt instrument that might have been used on the victim.
>
> WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the person of persons to be searched) The second floor at 42 Deckard St.Rox. and that part of the cellar controlled by Osborne Sheppard. 42 Deckard St. is a three story red brick apartment building with a basement that is attached to yellow & similar structures on both sides. and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

The police were unable to locate an appropriate search warrant form to present

to the magistrate for his approval. Some attempts were made to locate a clerk of the Roxbury Court, which is adjacent to the police station, and several other police stations were contacted, but these efforts were unavailing (Tr. 1:64-65). Detective O'Malley was able to find a form that had previously been used for drug searches in the jurisdiction of the Dorchester division of the Boston Municipal Court. On the cover of the warrant form, O'Malley crossed out the words "controlled substance," and on the face of the warrant, which is reproduced as an appendix to Justice Liacos' concurring opinion in the Supreme Judicial Court (J.A. 74a), he replaced the word "Dorchester " with the word "Roxbury" and typed in the defendant's address as the place to be searched. The trial court found that O'Malley knew that the warrant

form related to searches for controlled substances and needed to be adapted for use in this case (J.A. 25a), but did not alter the remainder of the warrant form, leaving the reference to controlled substances in the upper portion of the form, which constituted the formal application for the warrant, and in the lower portion, which would constitute the warrant itself.

At approximately 2:45 P.M. on Sunday, May 6, Detective O'Malley, Sergeant Bornstein, another officer, and the first assistant district attorney went to the home of Judge Joseph Feeney to present the application for the warrants (Tr. 1:60, 65). After the judge had reviewed the affidavit and had questioned O'Malley about its substance, they discussed the warrant which the police had prepared. The judge acknowledged that the form was

not appropriate. He searched his library for the proper form, but was unable to find one. He then told the police and the assistant district attorney that he would revise the form which they had brought with them. The judge took the form from Detective O'Malley and, in his presence, made some insignificant changes in the form and then signed it (Tr. 1:43-47).[3]

In fact, the judge made no substantive

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[3]The judge made only two minor alterations in the form. He crossed out the name of the presiding judge in the Dorchester court and wrote in his own name. He crossed out the reference to the Dorchester Court and wrote in the name of the Roxbury Court (J.A. 27a, 74a). Detective O'Malley testifed that he "observed [the judge] crossing out and writing in words on papers himself" (Tr. 1:47) and thus had the opportunity to see that the judge had not spent any time changing the warrant, that he crossed out only a few words and that he wrote in only a few words. Obviously, he knew or should have known that the judge had not made any significant changes in the form, and the trial judge did not find otherwise.

changes in the form, which authorized the police "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance." The signed warrant made no reference to the items specified in Detective O'Malley's affidavit, and the affidavit was not attached to the warrant. The warrant was then delivered to O'Malley for execution.[4]

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[4]The trial judge found that at this point the judge "informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested" (J.A. 27a), and this finding was apparently relied upon in the plurality opinion of the Supreme Judicial Court in concluding that the police reasonably believed the warrant was adequate. See Commonwealth v. Sheppard, supra, 387 Mass. at 502 (J.A. 54a). There is no evidence in the record that Judge Feeney made any such statements to O'Malley. Detective O'Malley testified only that the judge told him "he would adjust the (cont'd)

Over two hours later, O'Malley and several other police officers went to the defendant's home at 42 Deckard Street. The detective spoke with the defendant's mother and sister, showed them the warrant and entered the house.[5] In the course of the search, the police discovered and seized, among other things, two earrings, several articles of clothing, some wire and a number of items which appeared to be bloodstained. Each of these items was introduced in evidence at the defendant's trial.

(fn. 4 cont'd) ones that we had" (Tr. 1:47). There was no further testimony about the judge's statements to the police.

[5]The trial court made the following finding: "O'Malley orally informed them... that he had a warrant.... There was no evidence that either occupant asked to see it or that it was read spontaneously to them" (J.A. 28a). O'Malley testified, however, that "...we spoke to the defendant's mother and sister and I showed them the search warrant" (Tr. 1:49).

SUMMARY OF ARGUMENT

On May 6, 1979, a group of at least ten police officers entered Osborne Sheppard's home in Roxbury, Massachusetts to search for evidence of a murder. The police were acting under the authority of a warrant which had been issued by a judge of the Roxbury district court and which did not even mention the items which were the objective of the search.

1. There is no question that this search violated the Fourth Amendment because the warrant failed to particularly describe the things to be seized. The absence of such a description is a fundamental constitutional defect in the warrant. When a warrant fails to describe, either explicitly or by reference, the items to be seized, it contains no evidence that the issuing magistrate ever found

probable cause to authorize a search for those items, and it gives no direction to the police to limit their discretion in conducting the search.

The deficiencies of the warrant cannot be excused on the grounds that the search can be viewed as "reasonable" if one considers the "totality of the circumstances." Searches without a warrant particularly describing the things to be seized are per se unreasonable. The "totality of the circumstances" test, which was formulated in Illinois v. Gates, 103 S.Ct. 2317 (1983), for assessing the sufficiency of informant tips in establishing probable cause is not an appropriate standard for measuring compliance with the particularity requirement.

2. Given the clear illegalilty of the warrant, exclusion of the evidence

obtained under its authority is required by the prior decisions of this Court. The court should not accept the petitioner's invitation to carve out a "good faith" or "reasonable mistake" exception to the Fourth Amendment.

There is no precedent for the Government's suggestion that the Court should apply a "cost-benefit" analysis in deciding whether to make an exception to the rule that illegally obtained evidence should be excluded from the prosecution's case-in-chief in a criminal trial. This analysis has been applied heretofore only in considering extensions of the exclusionary rule.

Furthermore, the proposed exception is not only unworkable, it would do major violence to the Fourth Amendment. The "reasonable mistake" standard described in the Brief for the United States is so

broad as to permit almost every illegal search (other than those which are "flagrant," which "shock the conscience," or which are obviously illegal) to escape the sanction of the exclusionary rule. The adoption of such a standard would encourage police officers to conduct a search under circumstances where there is reason to doubt the legality of their actions and would effectively eliminate the requirement of probable cause.

The proposal that unconstitutionally obtained evidence should be admitted in virtually all cases where the police conducted a search pursuant to a warrant would make warrants virtually unreviewable. It ignores the fact that police officers have substantial responsibilities and discretion in applying for and executiing the warrant and would excuse all police errors in

obtaining and executing the warrant. It also ignores the need for effective review of the ex parte decisions made by magistrates.

By permitting the use of illegally obtained evidence in all cases in which the law was not perfectly clear, the proposed exception would remove any incentive for law enforcement officers to be knowledgeable about developments in the law and would reduce both the occasion and the perceived need for articulation of Fourth Amendment principles by the courts.

While the costs of the "reasonable mistake" exception are high, the need for such an exception has not been demonstrated. The government's criticsm of the exclusionary rule is in fact a criticism of the Fourth amendment, and its description of the impact of the

exclusionary rule is greatly overstated.

3. Even if the Court concludes that there should be a "reasonable mistake" exception to the exclusionary rule, the decision in this case should be affirmed. The exception proposed by the government purports not to apply to patently illegal searches where the magistrate had no business issuing the warrant. This is such a case. The error should have been obvious both to the issuing judge and to the police officers. The failure to take notice of the defects of the warrant under circumstances which had alerted them to the problem takes this case out the category of a "reasonable mistake."

The defect in the warrant cannot be overlooked on the grounds that it was "harmless error." This was a flagrant error involving an essential element of

the Fourth Amendment's warrant requirement. The suggestion that the error was meaningless because there was probable cause for the search overlooks the fact that there is nothing in the record which shows that the issuing judge ever made a finding that there was probable cause. Adoption of a "harmless error" test, moreover, would substantially undermine the Fourth Amendment by minimizing its explicit requirements of a warrant and reducing them to mere formalities.

ARGUMENT

I. THE SEARCH CONDUCTED BY THE BOSTON POLICE PURSUANT TO A WARRANT WHICH FAILED EVEN TO IDENTIFY THE ARTICLES TO BE SEIZED VIOLATED THE FOURTH AMENDMENT.

The trial court judge who heard, and denied, the motion to suppress the evidence seized by the police at the defendant's home found that the warrant which was relied upon by the police in this case was "so inappropriate [as] to be plainly unconstitutional" (J.A. 63a). The Supreme Judicial Court of Massachusetts agreed. The plurality opinion concluded that the warrant was defective in that it "failed to describe the items sought to be seized" and therefore "violated the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G.L. c. 276, §2." Commonwealth v. Sheppard, supra,

387 Mass. at 499-500, 501 (J.A. 51a-52a, 53a). The concurring opinion of Justices Liacos and Abrams was equally clear that the warrant was invalid because it "had no reference whatsoever to the items sought to be seized, contrary to the requirements of the Fourth Amendment...." Id. at 510 (J.A. 62a). The Massachusetts courts were clearly correct in this respect.

A. The Warrant Authorizing The Search Of The Defendant's Home Was Invalid Because It Did Not Particularly Describe The Things To Be Seized.

The Fourth Amendment to the United States Constitution provides that:

> ...no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The history of the adoption of the Fourth Amendment demonstrates that it was

principally designed to provide protection against general warrants, which gave British officials blanket authority to conduct searches. Stanford v. Texas, 379 U.S. 476, 481-484 (1965); Marcus v. Search Warrants, 367 U.S. 717, 724-729 (1961); Frank v. Maryland, 359 U.S. 350, 363-366 (1959). Thus, one of the "distinct objectives" of the warrant requirement "is that those searches deemed necessary should be as limited as possible. [T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. ... The warrant accomplishes this objective by requiring a 'particular description of the things to be seized.'" Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971).

This requirement of "particularity" is, as the Court has frequently observed, central to the protection afforded by the Fourth Amendment.

> The requirement that warrants shall particularly describe the things to be seized makes general warrants under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer.

Marron v. United States, 275 U.S. 192, 196 (1927). See also, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

The particularity requirement imposes limits on both the magistrate who issues the warrant and the police officers who are responsible for executing it. Before issuing a warrant, the magistrate must be satisfied that there is probable cause both to search a particular place and to seize particular objects. The particularity requirement thus prevents "the issuance of warrants on loose, vague

or doubtful bases of fact." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). This determination by the magistrate defines the legitimate scope of the search. The police, in turn, are limited in their conduct of the search to looking for those items which are specifically mentioned in the warrant. The particularity of the warrant also "insures the individual whose property is to be searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." United States v. Chadwick, 433 U.S. 1, 9 (1977).

In this case, the drug warrant issued by Judge Feeney was the sole basis for the authority of the police to enter and search the defendant's home. That warrant simply did not satisfy the particularity requirement. It not only

failed to describe with particularity the items to be seized, it failed to describe them at all. While the application had sought judicial authorization for the seizure of specific evidence which would have linked the defendant with the murder of Sandra Boulware, the warrant actually issued by the magistrate contained only a general authorization to conduct a search for something entirely different: controlled substance.

Because the judge failed to specify in the warrant that the police were authorized to search for the items listed in O'Malley's affidavit, there was nothing to indicate that he had found probable cause to search for any or all of those items.[6] Because the

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[6]There is no support in the record for the claim that the judge thought he was authorizing the search. See n. 44, infra.

warrant failed to specify which of these items could be seized, the officers who conducted the search were forced to guess which items could properly be taken. The warrant "left it entirely to the discretion of the officials conducting the search to decide what items [could be seized] and to accomplish their seizure." Lo-Ji Sales, Inc. v. New York, supra, 442 U.S. at 325. In so doing, they necessarily substituted their own judgment as to what should be seized for that of the magistrate. This is precisely what the Fourth Amendment forbids. Ibid.; Stanford v. Texas, supra.[7]

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[7]As Justice Jackson observed in Johnson v. United States, 333 U.S. 10, 13-14 (1946):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denied law enforcement the support of (cont'd)

It is no answer to say that the deficiencies of the warrant were somehow remedied by the more specific language of the affidavit or by the self-imposed restraint of the police officers in conducting the search. First, there was no indication on the face of the warrant that the magistrate intended to authorize the search for which the application had been made. It is a long-established and universally accepted rule that a warrant must incorporate an affidavit by

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(fn. cont'd) the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

reference and that the affidavit must be physically attached to the warrant in order for the information contained in the affidavit to supplement the terms of the warrant.[8] Neither requirement was met here.

Further, this is not a case in which the terms of the affidavit can be used to clarify an ambiguous warrant or to supplement a sparse but accurate description of the object of the search. The warrant here was simply inaccurate

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[8]See, e.g., United States v. Property Belonging to Talk of the Town Bookstore, 644 F.2d 1317, 1319 (9th Cir. 1981); In re Application of Lafayette Academy, 610 F.2d 1, 4 (1st Cir. 1979); United States v. Klein, 565 F.2d 183, 186 n.3. (1st Cir. 1977); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); United States v. Womack, 509 F.2d 368, 382 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975); Moore v. United States, 461 F.2d 1236, 1238 (D.C. Cir. 1972); See also, W.R. La Fave, Search and Seizure: A Treatise on the Fourth Amendment, §4.6 at 100 (1978).

and gave no notice of the items to be seized.[9] As the Supreme Judicial

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[9]While several lower courts have looked to the language of the affidavit or to knowledge of the police officers in upholding warrants which were ambiguous and therefore deficient in their description of the place to be searched or the things to be seized, it was apparent on the face of the warrant in all of those cases that the magistrate had made a finding of probable cause which was based on the contents of the affidavit. Resort to the language of the affidavit is justified only where the warrant contains an accurate, if sparse or ambiguous, description, and the affidavit merely clarifies what is in the warrant. See, e.g., United States v. Haydel, 649 F.2d 1152, 1157 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982); United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 104 S.Ct. 69 (1983); United States v. Thompson, 495 F.2d 165 (D.C. Cir. 1974). Where the warrant is facially insufficient rather than ambiguous the particularity requirement has not been satisfied and the warrant must be rejected. See, e.g., United States v. Abrams, 615 F.2d 541, 544 (1st Cir. 1980) (no description in warrant of records to be seized); United States v. Marti, 421 F.2d 1263, 1268-1269 (2d Cir. 1970), cert. denied, 404 U.S. 947 (1971). See also, W.R. La Fave, Search and Seizure: A Treatise on the Fourth Amendment, supra, §4.6 at 101.

Court noted in distinguishing the present case from a prior decision upholding a search conducted pursuant to a warrant which contained a partial misdescription of the place to be searched, "[t]he case before us is not, of course, ...one in which the search warrant was ambiguous." 387 Mass. at 498 n.9 (J.A. 50a).

Finally, the restraint of the police officers in conducting the search does not alter the fact that the warrant which authorized it was invalid. As this Court observed in Katz v. United States, 389 U.S. 347, 356 (1967), in rejecting precisely this argument:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.... They were not compelled, during the conduct of the search itself to observe precise limits established in advance by a specific court order.... In the absence of such safeguards, this court has never sustained a search upon the ground

> that the officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.[10]

The police executing the warrant to search Sheppard's home likewise had no "limits established in advance by a specific court order" to control their conduct. The limits of the search were set by their understanding of what the application prepared by Detective O'Malley would have justified had it been granted in its entirety. Even assuming that this understanding was correct, that the search actually conducted by the police did not exceed the limits of the

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[10] See also, United States v. Abrams, supra, 615 F.2d at 544; In re Application of Lafayette Academy, supra, 610 F.2d at 5; United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); United States v. Marti, supra, 421 F.2d at 1269.

application and that probable cause existed, the search nevertheless violates the Fourth Amendment because it was done pursuant to a patently invalid warrant.

B. A Search Under A Warrant Which Fails To Identify The Things To Be Seized Is Unreasonable Per Se And Cannot Be Remedied By Examination Of The Totality Of The Circumstances.

Acknowledging that the warrant in this action was defective, the state contends that the search was nonetheless "reasonable" when one looks at the totality of the circumstances, and therefore did not violate the Fourth Amendment. The acceptance of this position would be a radical and unprecedented departure from settled Fourth Amendment principles. The state's argument is that (1) under the Fourth Amendment a search conducted pursuant to a warrant that fails to meet the

particularity requirement is not necessarily unreasonable, and (2) accordingly, the Court should apply the totality of the circumstances test articulated in Illinois v. Gates, 103 S.Ct. 2317, 2327-2328 (1983), focusing on the nature of the police intrusion,[11] to determine whether a search conducted pursuant to a defective warrant is reasonable within the meaning of the Fourth Amendment. Brief for the Petitioner at 29. This argument is defective and should be rejected for

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[11]The state contends that police intrusion is the "fundamental concern of the Fourth Amendment." Brief for the Petitioner at 29, citing United States v. Calandra, 414 U.S. 338, 347 (1974). Calandra did not reduce the Fourth Amendment to a rule against police misconduct. The focus of the discussion in Calandra was the exclusionary rule, and nothing in that opinion suggests that the Fourth Amendment's procedural guarantees have been narrowed in the manner suggested by the state.

several reasons.

First, the state's major premise for this argument misstates the law. It is now beyond dispute that a seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." United States v. Place, 103 S.Ct. 2637, 2641 (1983).; Ybarra v. Illinois, 444 U.S. 85, 101-102 (1979).

Second, the "totality of the circumstances" test of Illinois v. Gates, supra, has no applicability here. The issue in Gates was whether the Court should modify the two-prong test for judging the sufficiency of information obtained from an informant in establishing the existence of probable

cause for the issuance of a search warrant. The Court held that the inquiry of the magistrate into the "veracity" or "reliability" of the informant and the "basis of knowledge" for the information provided to the police should not be "understood as entirely separate and independent requirements to be rigidly exacted in every case" but as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause'" and that "a deficiency in one may be compensated for, in determining the overall reliability of the tip, by a strong showing as to the other...." Id. at 2327-2329. This flexibility in the assessment of information obtained from an informant was deemed necessary because "probable cause is a fluid concept--turning on the assessment of

probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Id. at 2328. The two-prong test of Spinelli v. United States, 393 U.S. 410 (1969), was abandoned because it had "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from other facts presented to the magistrate." Illinois v. Gates, supra, 103 S.Ct. at 2330 (footnote omitted).

Unlike the determination of probable cause which was the focus of the Court's attention in Gates, particularity of description in a warrant is not a "fluid concept." To the contrary, it is specifically required by the language of the Fourth Amendment and is essential to its proper operation. Indeed, it is

precisely because probable cause is such a fluid concept that the Fourth Amendment's requirement of a warrant particularly describing "the things to be seized" takes on such significance.

Compression of the discrete requirements of probable cause and of a warrant particularly describing the things to be seized into a single test of "reasonableness" is inconsistent with the historical purpose of the Fourth Amendment. The Fourth Amendment was foremost a response to the colonial experience with the writs of assistance and general warrants. It has been noted that:

> [O]ur constitutional fathers were not concerned about warrantless searches but about overreaching warrants.... Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches.

T. Taylor, Two Studies in Constitutional

Interpretation 41 (1969). The warrant requirement, with its specific elements of probable cause and particularity, was intended to insure that any warrant issued would be "exacting in its foundation and limited in scope," Davis v. United States, 328 U.S. 582, 605 (1948) (Frankfurter, J., dissenting), so as to prevent "unreasonable and oppressive searches." The state would have the Court disregard this history and reduce the review of searches to a post hoc consideration of their reasonableness. As Justice Frankfurter wrote over thirty years ago:

> One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

The standard proposed by the state also seeks to work a fundamental change in the Fourth Amendment. In minimizing the role of the warrant requirement, the state would postpone consideration of the legality of the search until after it has taken place. This, however, ignores the fact that the Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

II. THE COURT SHOULD NOT ADOPT A GOOD FAITH OR REASONABLE MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE.

A. Nothing in this Court's Precedents Supports the Application of a Cost-Benefit Analysis to the Decision Whether or not to Apply the Exclusionary Rule to the Introduction of Illegally Obtained Evidence in the Government's Case in Chief in a Criminal Trial.

The Government[12] contends that its proposal for a "reasonable mistake exception" in all criminal cases for all purposes is supported by United States v. Calandra, supra, 414 U.S. 351, Stone v. Powell, 428 U.S. 465 (1976), United States v. Janis, 428 U.S. 433 (1976), and United States v. Havens, 446 U.S. 620 (1980). The analysis goes as follows: First, the exclusionary rule is "merely" a judge-made rule of evidence, Brief for

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[12]In this section, we are responding to the arguments advanced in the Brief for the United States. The term "the Government" refers to the United States unless othewise noted.

the United States at 31, whose primary purpose is the deterrence of police misconduct. Id. at 33. Second, this Court has imposed a "cost-benefit" analysis when it has confronted "expansions" of the rule or "has examined afresh the propriety of certain applications of the rule." Id. at 35. Third, the costs of the rule will always outweigh the benefits in any situation in which a reasonably well-trained officer would not recognize the search to be unlawful or in which a search is conducted pursuant to a warrant. Id. at 57.

The government's analysis is wrong as a matter both of precedent and of policy. The cases upon which its cost-benefit approach is predicated were all premised on the assumption that unconstitutionally obtained evidence

will be excluded from the prosecution's case in chief. If that premise is undercut, as the government proposes, then the logic behind such decisions as Stone and Calandra disintegrates.

Thus, in Calandra, where the Court declined to apply the exclusionary rule to grand jury questions based upon illegally seized evidence, it declared: "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U.S. at 351 (emphasis added). In Stone, the Court likewise reasoned in terms of the "incremental," "additional," or "marginal" deterrent effect of permitting habeas corpus petitioners to litigate exclusionary rule claims in collateral proceedings. 428 U.S. at 487-495. In Janis, the Court recognized

that the infrequency of the use of illegally seized evidence in civil trials renders exclusion in that context of limited deterrent value. 428 U.S. at 454. See also, United States v. Havens, 446 U.S. 620, 627-628 (1980); Alderman v. United States, 394 U.S. 165, 175 (1969).

The Government also argues that this Court's decisions on the retroactivity of constitutional principles employ the "same balancing analysis" that it claims supports its proposal for replacing the exclusionary rule with an ad hoc cost-benefit analysis. Brief for the United States at 37. In so concluding, the government relegates this Court's most recent retroactivity decision, United States v. Johnson, 102 S.Ct. 2579 (1982) to the obscurity of a footnote.[13]

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[13]The Government describes (cont'd)

But in Johnson this Court held that Payton v. New York, 445 U.S. 573 (1980), should be applied retroactively to all cases not final at the time of the decision. Because Payton clarified an area that had been left unsettled, the Court declined to balance cost and

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(fn. cont'd) Johnson as a case which reflects the Court's concern with according "fundamental fairness for persons similarly situated rather than any general retreat from the balancing analysis the Court has consistently employed in the context of the exclusionary rule." Brief for the United States at 37. The decision in Johnson, however, expressly criticizes previous rulings of the Court dealing with retroactivity, and particularly those cases in which a balancing approach had led to the "selective award" of retroactivity to litigants who happened to make it to the Supreme Court first. With respect to retroactivity of Fourth Amendment law, the Court specifically criticized the "balance" which the Government now urges, that in "unsettled" areas of the law decisions should not be made retroactive because any mistake which the searching official made must be described as "reasonable." 102 S.Ct. at 2593.

benefit in the fashion urged here by the Government.[14] Whereas a cost-benefit analysis may be applied to cases representing a "clear break" with prior precedent, it cannot be applied to an area in which the law was unsettled. Johnson, supra, 102 S.Ct. at 2586-2588, 2592-2593.

These precedents show that the Court has exercised discretion to balance the cost and benefit of the exclusionary rule only at the periphery. At the

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[14]The Court in Johnson noted: "Because this Court cannot rule on every unsettled Fourth Amendment question, years may pass before the Court finally invalidates a police practice of dubious constitutionality....Furthermore, the court's opinions consistently had emphasized that, in light of the constititutional protection traditionally accorded the privacy of the home, police officers should resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant...." 102 S.Ct. at 2593.

core--the use of illegally obtained evidence against a defendant in the Government's case in chief--the Framers' balance is, and must be, undisturbed.[15]

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[15]A cost-benefit approach makes no sense when individual rights--and particularly Fourth Amendment privacy rights--are concerned. There is no way to measure whether or not deterrence is successful, i.e., how many illegal searches have been deterred. The benefit to the citizenry of personal privacy is inchoate and unmeasurable. Stone v. Powell, supra, 428 U.S. at 492 n.32; United States v. Janis, supra, 428 U.S. at 450-51 n.22-26.

See also, Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under Fourth and Fifth Amendments, 90 Harv.L.Rev. 945, 983 n.235 (1977); Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind.L.J. 329, 323-33 (1973); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 386 n.33, 387 n.34 (1981); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 678 (1970).

Former Justice Stewart also takes the position that a cost-benefit approach is inappropriate to the (cont'd)

B. The Proposed Reasonable Mistake Doctrine Is Unworkable, And Would Effectively Amend The Fourth Amendment And Undermine Obedience To Its Commands.

(1) The proposed exception is ill-defined and ill-conceived, and would legitimize conduct expressly forbidden by the Fourth Amendment.

The Solicitor General proposes a test with both a subjective and an objective component.[16] The test

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(fn. cont'd) Fourth Amendment. The exclusionary rule, according to Justice Stewart, is not just another judge-made remedy, as Justice White suggests in Gates, 103 S.Ct. at 2342, but a constitutionally-mandated remedy. Since the responsibility for enforcing the Amendment rests on the judiciary, it may be necessary for the judiciary to remove the incentive for its violation. The question is whether there should be exclusion, or whether there are other remedies adequate to the task. He, like many other commentators, concludes that there are not. Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Col.L.Rev. 1365, 1384 (1983).

[16]Brief for the United States at 78 quoting United States v. Williams, 622 F.2d 830, 841 n.4 (cont'd)

is founded on the officer's belief that his conduct is not unlawful, but in light of criticisms levelled against a subjective good faith exception, [17] the Government then attempts to limit the application of the exception to those cases in which the officer's belief would be labelled objectively reasonable. However, the Government sees such a broad range of conduct as objectively reasonable that the limitation is virtually meaningless.[18]

(fn. cont'd) (5th Cir. 1980)(en banc), cert. denied, 449 U.S. 1127 (1981), ("we emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness."). See also, Illinois v. Gates, 103 S.Ct. at 2346 (White, J. concurring).

[17] See Brief for the United States, at 78-80. See also, Beck v. Ohio, 379 U.S. 89 (1964).

[18] The Government's proposal not only alters the test for determining the application of the exclusionary (cont'd)

The Solicitor General describes a "spectrum" of Fourth Amendment violations, from the "flagrant," in which deterrence is said to be most effective, to the "technical," in which it is said to be least effective. Brief for the United States at 44-45.

On the "flagrant" end are those situations in which the police officer knew or should have known that his conduct violated the norms of the Fourth Amendment. On the other end are those situations in which the police officer

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(fn. cont'd) rule; it appears to suggest a complete reversal of the burden of proof. The new rule would be that illegally obtained evidence is admissible. The exception--which the defendant would have to establish--would be its exclusion. Brief for the United States at 38-39. While the Government continues to label its proposal an "exception," its analysis appears to go much further. This burden shifting would effect a major change in Fourth Amendment law.

and indeed, his department, could not possibly have known of the applicable principles because they changed dramatically after the search, and thus, the officer's conduct would not be subject to an exclusionary rule. Under the present law the latter situation is not a violation of the Fourth Amendment.[19] In between these extremes is the realm of "reasonable mistake."

The breadth of the exception obviously depends upon what is meant by "flagrant". For the most part, the Government shrinks from defining flagrant with any precision and would leave it to the lower courts to

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[19] See, Michigan v. DeFillippo, 443 U.S. 31 (1979) (substantive law governing the arrest later declared unconstitutional); United States v. Peltier, 422 U.S. 531 (1975) (law with respect to border searches reversed).

articulate the appropriate standards on a case by case basis. Id. at 48. Were this Court to adopt such an approach it would send a message to police officers that they may act first and take their chances that their actions will later be deemed reasonable. See United States v. Johnson, supra, 102 S.Ct. at 2593-94.

The Government suggests that flagrant violations are simply violations of well-settled principles.[20] Id. at

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[20]At times the Government appears to be defining "flagrant" in an historical fashion, referring to the time when the exclusionary rule was only applied to "arrogant" or "brazen" behavior or "egregious misconduct." Id. at 56. Such an interpretation may very well return Fourth Amendment jurisprudence to the law pre-Mapp v. Ohio, supra, 367 U.S. 643, when the only conduct clearly subject to exclusion in the state courts was that condemned in Rochin v. California, 342 U.S. 165 (1952), namely, conduct that "shocks the conscience." In effect, the lines between the Fourth Amendment and the due process clause of the Fifth Amendment would once again become obfuscated.

44. In the areas where principles are anything less than "well-settled," illegal searches presumably would be tolerated. These areas may well include instances in which the Court was less than precise in articulating constitutional principles,[21] or situations in which there is a conflict in the circuits, or between a district

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[21]As Justice Stewart notes: "The occupation of a judge requires application of the Fourth Amendment's sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials. If the outcome of fourth amendment cases has come to be regarded as turning on 'technicalities,' it is in part because of the inevitable human shortcomings of judges faced with the task of articulating fourth amendment principles applicable in a broad range of situations while doing justice in a particular case. Most justices do their best, but that is not always good enough." Stewart, supra, 83 Col.L.Rev. at 1393.

court and courts of appeal, or where the issue is before this Court.[22]

Indeed, the Solicitor General offers the exception precisely to encourage the police to search when the law is "unsettled." The Government decries the fact that the excusionary rule "chills" officers from acting when a particular search is "closer to the indistinct line often separating lawful from unlawful searches and seizures," where the search in question is as likely to be lawful as

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[22]The Government suggests that since such imprecision occurs all too often, police officers "will neither know the scope of their authority" nor be sufficiently deterred from improper action to justify the continuation of the rule. Id. at 50. That description more accurately predicts the state of the law if the Government's exception is erected. With an open-ended reasonable mistake doctrine, the police will have no idea when unlawful conduct will be excused and when it will be punished.

unlawful. Id. at 73.[23] The short answer is that these situations are precisely the ones in which the Fourth Amendment exhorts police officers not to search. The Fourth Amendment encourages officers to err on the side of restraint, to impinge on privacy only when the level of certainty described in the probable cause standard is met.[24]

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[23]The Government would excuse the officers' conduct in United States v. Williams, supra, 622 F.2d 830, because "[s]ociety expects the police to act in such situations, and it cannot seriously be urged that society is benefitted, or that individual constitutional liberties are meaningfully advanced, by a rule of law that causes an officer to doubt the propriety of taking action when he observes what he reasonably believes to be an offense in progress." Id. at 48. Regardless of what "society believes," the Fourth Amendment prohibits such behavior where the officer is speculating about the scope of his arrest powers. See United States v. Johnson, supra, at 2594.

[24]Indeed, the decision to err on the side of caution and restraint is central to Anglo-American (cont'd)

See, United States v. Johnson, supra, 102 S.Ct. at 2593, 2594. Where the situation is ambiguous or the law unclear, he is not permitted to act.

Since, as the Government admits, it is so difficult to prove what is in an officer's mind, the exception may well encourage officers not only to act when they are uncertain but even when they in fact understand the law, using imprecise draftsmanship, or a less than unanimous decision, as an excuse. The officer need no longer ask whether the circumstances establish probable cause. He need only ask whether or not he has a reasonable excuse for thinking that

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(fn. cont'd) jurisprudence even if it means that unlawful searches are sometimes deterred or the guilty escape punishment. In effect, that is the meaning of the statement: "It is better that ten guilty persons escape than one innocent suffer." 4 W. Blackstone, Commentaries, ch. 27.

there was probable cause. If the answer to the second question is yes, he will search even if he knows that there is no probable cause. Mertens, & Wasserstrom, supra, 70 Geo. L.J. at 455; Stewart, supra, 83 Col. L.Rev. at 1402; LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U.Pitt.L.Rev. 307, 352 (1982).

2. The proposed warrant exception would excuse a broad range of warrant errors.

Under present law, where the defendant challenges a warrant search, he bears the burden of proof.[25] Where the claimed error is the lack of probable cause, the magistrate's findings must be accorded "due deference." Illinois v. Gates, supra, 103 S.Ct. at 2332-2332; Spinelli v. United States, 393 U.S. 410, 419 (1969). In the case of other warrant errors, like the failure to comply with the particularity requirements, the reviewing courts will exercise greater

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[25]In a warrantless search, the burden of proof is on the Government, while in a warrant search, it is the reverse. Katz v. United States, supra, 389 U.S. at 357; McDonald v. United States, 335 U.S. 451, 456 (1948); United States v. Jeffers, 342 U.S. 48, 51 (1951). See also, United States v. De LaFuente, 548 F.2d 528, 534 (5th Cir.), cert. denied, 431 U.S. 932 (1977).

scrutiny.

The proposed warrant exception would excuse a far broader range of warrant errors than does the existing law. It would establish a nearly irrebuttable presumption that the warrant is adequate. The only situations subject to the sanction of exclusion would be those in which there has been "flagrant abuse," Brief for the United States at 65, but "flagrant" is again undefined. The Government says only that situations in which warrant violations would be considered flagrant include those in which the factors relied upon by the magistrate "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," id. at 65, citing Brown v. Illinois, supra, 422 U.S. at 610-611 (Powell J. concurring), or in which the

warrant was procured in bad faith or on the basis of material misrepresentations. Ibid., citing Franks v. Delaware, 438 U.S. 154 (1978).[26]

The warrant errors that would be tolerated include more than errors in determinations of probable cause.[27]

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[26]"Flagrant" in this context is even narrower than the concept of "well settled principles." After Gates v. Illinois, supra, flagrant may well include only those situations in which warrants like those in Nathanson v. United States, 290 U.S. 41 (1933), or Aguilar v. Texas, 378 U.S. 108 (1964), are reviewed. In light of the more flexible standard approved in Gates, it is all the more important to preserve independent review of the warrant process. To adopt a Gates standard and to insulate warrants from judicial review would effectively take the Court out of the business of enforcing the Fourth Amendment. See Stewart, supra 83 Col.L.Rev. at 1397. See also, Illinois v. Gates, supra, 103 S.Ct. at 2350-2351 (White J., concurring).

[27]It should be noted that electronic surveillance would fall completely into the warrant exception. There can be no doubt that this area is one in which judicial scrutiny is (cont'd)

There might well be no exclusion if the officer fails to describe the place to be searched or the items seized with sufficient particularity to satisfy the constitutional standard, or if the officer executes a patently imprecise or defective warrant without bothering to read it--as in Sheppard. Indeed, under the Government's scheme evidence would not be excluded even if the warrant were fundamentally tainted by the fact that the magistrate acted improperly, such as conducting his own investigation, as in Lo-Ji Sales, Inc. v. New York, supra.[28] An exception of this

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(fn. cont'd) most important since the potential for abuse is great. See, e.g., Silverman v. United States, 365 U.S. 505, 509 (1961).

[28]Finally, the warrant exception would leave the individual aggrieved by an illegal search without a remedy, either criminal or civil. The warrant itself makes the police officer (cont'd)

breadth cannot be justified. The Government argues that police errors pursuant to a warrant should not trigger the exclusionary rule because the police have done all that can be expected of them once they have secured a warrant. Brief for the United States at 61. It also argues that the exclusionary rule should not be applied to magistrate errors since magistrates who are not part of the "law enforcement team" are not deterred by the exclusion of evidence. Id. at 59.

This argument substantially understates the responsibilities of police officers in the warrant process, suggesting that all that is required of the officer is that he obtain a

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(fn. cont'd) immune from suit. At the same time, judicial immunity leaves the magistrate invulnerable. Stump v. Sparkman, 435 U.S. 349 (1978).

warrant. A police officer is not entitled to take a warrant at face value under all circumstances. He may not rely on a warrant which he has obtained by means of knowingly or recklessly false statements. Franks v. Delaware, 438 U.S. 154 (1978). Likewise, in executing the warrant, he cannot reasonably rely on a warrant which he knows to authorize a search for items which were not mentioned the application. The police officer is not expected to forget the statements he made in obtaining the warrant when the time comes for him to execute it. Moreover, where he does execute the warrant, the police officer is required to read it to observe the limits which it sets on the scope of the search. A rule which lifts all responsibility for errors from police shoulders would

encourage police officer carelessness. Moreover, since the warrant would be virtually unreviewable, officers would have every incentive to go "magistrate shopping." Mertens, & Wasserstrom, 70 supra, 70 GeoL.J. at 456.

The Government also misperceives the role of the magistrate. Although the magistrate is more removed from pressures of criminal investigation, the warrant process remains a quick, ex parte proceeding. There are compelling reasons for the courts, and particularly this Court, to review and to act on errors committed by a magistrate. As Justice Liacos observed in his concurring opinion inthe Supreme Judicial Court:

> The plurality opinion appears to recognize that suppression of illegally seized evidence may encourage greater care by magistrates in the future, but expresses doubt as to the efficacy

> of such a rule in deterring judicial error. I strongly disagree. Our responsibility as the court of last resort in this Commonwealth requires that judicial violations of the Fourth Amendment find no sanction, express or implied, in our opinions. Unless this court "safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." United States v. United States District Court, 407 U.S. 297, 312 (1972). The language in today's opinion will hardly encourage greater care by judges who issue search warrants. Indeed, the language of the plurality cannot but encourage negligent behavior, a hardly laudable characteristic of judicial conduct. Common sense tells me that greater care will be encouraged if the rule remains as it is, viz., evidence seized under an invalid warrant will be suppressed.

387 Mass. at 514 (J.A. 66a).

Finally, if the courts do not carefully review the magistrate's handiwork, he has no means of knowing what he did right or wrong. While the Government maintains that a court could admit evidence obtained through a

warrant, and at the same time declare that the warrant violated the Fourth Amendment that is unlikely.[29] If it did issue such an advisory opinion, some time after the warrant had been issued, the magistrate would still have little incentive to refrain from repeating the same mistake or from granting any colorable request for a warrant. Stewart, supra, 83 Col.L.Rev. at 1403. The message conveyed to magistrates would be that whatever errors they made, they are not severe enough to trigger the "flagrant" standard. Given the pressures of a criminal investigation, even at the level of a magistrate, the exception would promote carelessness.

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[29]See Section B(3).

3. The "reasonable mistake" and the warrant exception would dismantle the mechanisms of systemic deterrence by freezing Fourth Amendment law and discouraging police training.

The "reasonable mistake" doctrine is premised on a concept of individual deterrence which has never been accepted by this Court. See Elkins v. United States, 364 U.S. 206, 217 (1960). This theory holds that the exclusionary rule operates on the individual police officer to whom it is applied, by imposing sanctions on his noncompliance. However, as several commentators have suggested, the exclusionary rule affects police conduct through systemic deterrence. Mertens & Wasserstrom, supra, 70 Geo. L.J. at 399; Stewart, supra, 83 Col.L.Rev. at 1400. It encourages the courts to exmaine police conduct and articulate the constitutional standards in the light of

modern police techniques and situations. These pronouncements, coupled with the sanction of exclusion, provide the guidelines and the incentive for law enforcement agencies then to train officers to comply with the Fourth Amendment.

The reasonable mistake doctrine would dismantle this system at both ends: the development of Fourth Amendment law, and police training. In the area of legal principles, the exception would allow--indeed, encourage--courts to avoid deciding underlying substantive issues (for example, whether or not there was probable cause) in favor of deciding only questions of remedy (whether or not there was a reasonable excuse for thinking that there was probable cause). While the Government maintains

that courts could decide liability before they address remedy, it is clear that they would have little incentive to do so if there is no remedy, i.e., if a reasonable mistake may be found.[30] Litigants would surely have no such incentive. A fortiori they would not raise novel claims since new principles would not be applied in their cases. Mertens & Wasserstrom, supra, 70 Geo.L.Rev. at 451.

Thus, the growth which has been is central to the Fourth Amendment, as it

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[30] The Government maintains that one of the problems with the exclusionary rule is that judges are not willing to condemn questionable practices because of the extreme consequences that attach to such decisions--namely the exclusion of the evidence. By the same token, judges are surely not encouraged to condemn a given practice when there are no consequences in that case. Indeed, Article III may bar the giving of such an advisory opinion. See Mertens & Wasserstrom, supra, 70 Geo.L.J. at 450.

applied to changes in society, would be stymied. If a "reasonable mistake" doctrine had been in place during the past 15 years, many critical Fourth Amendment issues would not have been resolved.[31]

The proposed exception would also eliminate the incentive to train police officers in all aspects of Fourth

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[31] See, e.g., Payton v. New York, 445 U.S. 573 (1980); Ybarra v. Illinois, 444 U.S. 85 (1980); Delaware v. Prouse, 440 U.S. 648 (1979); Torres v. Puerto Rico, 442 U.S. 465 (1975); Chimel v. California, 395 U.S. 752 (1969); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

The Government appears to welcome such a result, characterizing the "lost decisionmaking opportunities" as inhabiting only "grey, twilight areas of Fourth Amendment law where the constitutional violation, if any, is minimal," or areas of "marginal constitutional significance," involving "nettlesome but relatively inconsequential underlying substantive questions," or "nonrecurring" fact-specific issues. Brief for the United States at 82-83.

Amendment law. If officers are held responsible only for blatant errors and if searches with warrants become virtually unreviewable, police departments will lack the incentive to teach all of the rules.

While the Government recognizes that a purely subjective "good faith" test puts a premium on ignorance, and even dissembling, it claims that the addition of objective standards eliminates the problem. The police would be charged with knowing certain rules, violations of which would not be excused. However, the rules for which they would in fact be held responsible occupy a very narrow part of the spectrum--the so-called clear, settled principles of Fourth Amendment law. In the developing and unsettled areas, good faith ignorance

would be tolerated.[32] Departments as well as individual officers would

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[32] The "reasonable mistake" approach represents an attempt to engraft a negligence standard onto the exclusionary rule. The reasonably well trained police officer, following the standards of his reasonable training, like the "reasonable man" in tort law, will not be charged with violating the Fourth Amendment. When an officer departs from this mythic reasonable police officer standard his actions will be subject to the exclusionary rule. This model, the Government may argue, is more beneficial and less costly than the "strict liability" exclusionary rule, now in place. However, the standard for the "reasonable police officer" would not be nearly as stringent as the standard for comparable actors in tort law. A doctor, for example, is charged with knowing the subtleties and frontier areas of his practice. The "reasonable police officer" would not be. All that he would have to know are the basic principles: he can muddle through all other situations. In any event, a "strict liability" model is appropriate where the awesome power of the government is concerned. As strict liability forces manufacturers to develop new safety devices, so the absence of a "reasonable mistake" doctrine provides the incentive for police departments to train their officers and to develop procedures for compliance.

thus have an incentive to take chances, with training as well as with on-the-spot decisions.

Thus, despite the Government's objective gloss on the "good faith" exception, the same problem remains: An ignorant officer would be more likely to make good faith mistakes, and a police department which taught the minimum to its officers would thereby expand the scope of "good faith" mistakes. Mertens & Wasserstrom, supra, 70 Geo. L.J. at 448; LaFave, supra, 43 U.Pitt. L. Rev. at 342-343.

C. The Reasonable Mistake Exception Is Unnecessary: There Is No Cost To The Continuation Of The Exclusionary Rule Beyond The Costs Already Imposed by the Fourth Amendment.

The fundamental premise of the Government's "reasonable mistake" doctrine is that somehow the exclusionary rule has become too costly. However, the costs it cites are either greatly exaggerated or merely those already imposed by the Fourth Amendment and not open to this Court to reconsider.

First, the Government paints a picture of Fourth Amendment jurisprudence that is disingenuous, implying that constitutional standards have become technical or subtle, that officers, trying in good faith to follow

them, frequently err. Brief for the United States at 49-52. But over the last several years, this Court has clarified many unsettled areas; it has broadened police power to search,[33] and articulated more flexible rules[34] for arrests and warrants. These cases demonstrate that it is not necessary to gut the exclusionary rule in order to provide police with workable standards; to the contrary, it is the courts, and not the police, that must articulate the standards, and this Court has consistently done so.

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[33] The Court has broadened the concept of search incident to arrest, United State v. Robinson, 414 U.S. 218 (1973), expanded the contours of "consent" to searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and simplified the rules for auto searches, United States v. Ross, 456 U.S. 798 (1982).

[34] It has held that allegations of negligent falsehood or innocent (cont'd)

Another "cost" cited by the Government is that relevant evidence is suppressed as a result of the rule. The Framers knew that price from the outset. It is the cost of doing without evidence that never should have been obtained in the first place. See, e.g., Brinegar v. United States 338 U.S. 160, 176 (1949).

Another "cost" of the rule, according to the Government, is that it compensates only those accused of crime,

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(fn. cont'd) mistake of fact are insufficient to set aside a search warrant, Franks v. Delaware, supra, excused a factual error made by a police officer in arresting an individual where there was otherwise ample probable cause to arrest, Hill v. California, 401 U.S. 797 (1971), and held that reliance on a substantive criminal statute, later held to be unconstitutional, or settled Fourth Amendment law, later expressly overruled, does not extinguish a finding of probable cause, Michigan v. DeFillippo, supra, and United States v. Peltier, supra. See also, Illinois v. Gates, supra.

failing to succor the "most deserving"--the innocent victims. Brief for the United States at 23, 74. But the Bill of Rights applies to the guilty and the innocent. Moreover, the extent to which the exclusionary rule fails to compensate innocent victims suggests only that it is an incomplete remedy, not that it is unnecessary. Stewart, supra, 83 Col.L.Rev. at 1396.

The criticism that the exclusionary sanction is disproportionate to the violation is also misplaced. The rule might be disproportionate if its only purpose were to compensate the victim of the search. If the purpose of the rule is broader, establishment of systemic deterrence, the sanction is perfectly appropriate.[35]

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[35] By the same reasoning, one could, for example, argue that the (cont'd)

Finally, the Government cites the rule's "substantial impact" on the prosecution's ability to obtain convictions and the burden suppression litigation places on the courts. Brief for the United States at 23, 70-75. The empirical data do not support these conclusions. A 1979 study by the General Accounting Office found that of all the cases declined for prosecution by United States attorneys, Fourth Amendment problems were the primary reason in only .4% of the total. Comptroller General, U.S. General Accounting Office, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979) (Rep. No. GGD 79-45). The data which the Government cites for the opposite conclusion is

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(fn. cont'd) cost of the presumption of innocence or the concept of proof beyond a reasonable doubt is too high.

faulty.[36]

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[36] The Government relies upon a recent National Institute of Justice (NIJ) study of prosecutions in California, Brief for the United States at 70, that states that search and seizure issues led the Government to decline prosecution in "4.8% of the more than 4,000 felony cases," and that in drug cases, 30% were rejected on these grounds. But this study has been shown to be seriously flawed and dramatically overstates the impact of the exclusionary rule on criminal prosecutions. The respondent adopts the arguments on this issue made in the Brief for the Respondent Leon in United States v. Leon, No. 82-1771. See, T. Davies, What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 A.B.F. Res.J. (No. 3, forthcoming); See, also, R. Van Duizend, L. P. Sutton & C. Carter, The Search Warrant Process: Preconceptions, Perceptions, Practices (Draft Only) (National Center for State Courts, Williamsburg, Va. 1983); P. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Research Journal (No. 3) (forthcoming); Davies, Do Criminal Due Process Principles Make a Difference? 1982 Am.B.F.Res.J. 247; Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S.Tex.L.Rev. 559, 576 (1982).

III. THE ADOPTION OF A GOOD FAITH OR REASONABLE MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT CHANGE THE OUTCOME IN THIS CASE.

A. The Items Seized At The Defendant's Home Should Be Excluded Because The Error In The Warrant Was "Flagrant" And The Warrant Should Never Have Been Issued by The Magistrate.

Assuming arguendo that a reasonable mistake exception is adopted, this case does not fit within it. The good faith or reasonable mistake of a police officer cannot redeem a clear, indeed, flagrant, judicial error in issuing a warrant and should not provide the basis for admission of evidence obtained with that warrant. Even if the Court were to accept the government arguments that the exclusionary rule is inappropriate in most cases involving a search conducted pursuant to a warrant, in those flagrant cases, in which the warrant is plainly illegal, suppression of the evidence

is required. This is just such a case.

The Solicitor General concurs that there are cases in which the defects of a warrant alone should foreclose further inquiry into the validity of the search, Brief for the United States at 65, and would apply this qualification at least in cases involving patent illegality in which "no officer...could reasonably rely on [the] warrant in light of the unambiguous legal authority," ibid., or alternatively in "those situations in which 'no well-trained officer could reasonably have thought that a warrant should issue.'" Id. at 66 n.28, citing Illinois v. Gates, 103 U.S. at 2346 (White, J., concurring). This, of course, is precisely the situation in Sheppard, as the Solicitor General implicitly acknowledges. Brief for the United States at 67 ("...the search

warrant was technically defective and the defect, had it been noticed, would have been obvious to the issuing judge and to the officers as well").

The Commonwealth of Massachusetts also concedes in its brief that the magistrate committed a "negligent error" in issuing the warrant relied upon by the police in searching the defendant's home. Brief for Petitioner at 25.[37]

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[37] Justice Liacos points out in his concurring opinion:

> Nowhere in the [trial] judge's written findings is there a finding that the actions of the magistrate were merely negligent. Indeed ... at the hearing on the motion he characterized the actions of the magistrate in these terms: "...so inappropriate [as] to be plainly unconstitutional," ... a "general warrant" akin to the colonial "writs of assistance" ..."flies right in the face of the constitution" ...a "judicial blunder." In describing the warrant, he stated he had "never seen anything so plainly on its face a nullity." A reading of the search warrant in this case reveals (cont'd)

The egregious nature of the magistrate's error forecloses the state's argument that there should be no further inquiry into the legality of the search. That error was a clear, and easily avoidable, violation of the particularity requirement, an essential element of the Fourth Amendment It was a defect in the warrant itself, the one document which is to be executed by a judicial officer. Furthermore, Judge Feeney was fully aware of the defects in the warrant presented to him for his signature.[38] He was

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(fn. cont'd) that the judge's views were not unduly harsh.

387 Mass. at 511 (J.A. 63a).

[38] It should be assumed that Judge Feeney was fully cognizant of the statutory and constitutional requirements for particularity in a warrant. He was not a lay clerk without training in the law, see Shadwick v. City of Tampa, 407 U.S. 345 (1972), but a judge of the Municipal Court who, at the time he issued the warrant, had been on (cont'd)

informed by the police that they did not have the correct form; they discussed the problem with the warrant; he searched for a more suitable form in his library and, finding none, he examined the warrant and made some unimportant changes. Finally, it is clear that the judge could easily have made the necessary changes in the warrant if he had taken the time to do so.[39]

Like warrants which are "so lacking in indicia of probable cause as to render official belief in its existence entirely

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(fn. cont'd) the bench for 22 years. Massachusetts Lawyers Weekly Guidebook 79 (1982).

[39] See United States v. LaMonte, 455 F.Supp 952, 964-965 (E.D. Pa. 1978)(handwritten warrant raises no Fourth Amendment problem); see also United States v. Marti, 421 F.2d 1263, 1269 (2d Cir. 1970)("the inconvenience of copying the specific elements from the affidavit into the warrant is small, and the dangers inherent in the failure to do so are great.")

unreasonable," Brown v. Illinois, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring), and like warrants which are totally unsupported by probable cause, see, e.g., Aguilar v. Texas, supra; Nathanson v. United States, supra, or which are issued by a magistrate who is not "neutral and detached," see, e.g., Lo-Ji Sales, Inc. v. New York, supra, a warrant which utterly fails to satisfy the particularity requirement in that it does not describe the items to be seized is one which the magistrate had "no business issuing." Illinois v. Gates, 103 S.Ct at 2345 (White, J., concurring). The stark illegality of such a warrant, measured by the explicit language of the Fourth Amendment's particularity requirement and its consistent interpretation in the decisions of this Court, is such that the

error in issuing it could never be seen as "reasonable."

For example, in Marcus v. Search Warrants, 367 U.S. at 733, the Court found invalid an "obviously defective" warrant authorizing the seizure of "obscene materials," not otherwise described, which allowed the police to seize all materials which, in their judgment, were obscene. Similarly, in Stanford v. Texas, supra, a warrant which was issued for written materials concerning the communist party of Texas and which the Court held gave the officer the "unbridled authority of a general warrant," was disapproved. 379 U.S. at 486.

The warrant in this case was no less "obviously defective" than the warrants in Stanford and Marcus. It was a warrant which should not have been issued, and

for that reason, wholly apart from any asserted good faith on the part of the police officers who executed it, the evidence seized under its authority must be suppressed.

B. The Police Officers Were Not Acting In Good Faith And Did Not Make A Reasonable Mistake In Executing The Warrant.

The essential element of the "good faith" or "reasonable mistake" exception to the exclusionary rule proposed by the Commonwealth of Massachusetts and the Solicitor General is that the conduct of the police officers must be objectively reasonable.[40] Even under the

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[40] Justice White's formulation of the exception, which has been cited in both government briefs, suggests that it should be invoked only where the police officer was "acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." Stone v. Powell, 428 U.S. 465, 538 (1976)(White, J., dissenting)(emphasis added).

narrowest reading of the proposed exception, it would not apply to searches which were so plainly in violation of the Fourth Amendment as to render official belief in their legality entirely unreasonable. See Brown v. Illinois, 422 U.S. 590, 610-611 (1975)(Powell, J., concurring). There can be no claim that police officers were acting in good faith when they have engaged in "willful, or ... negligent, conduct which has deprived the defendant of some right." Michigan v Tucker, 417 U.S. 433, 447 (1974), and where they had "knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." United States v. Peltier, 422 U.S. 531, 542 (1975).

While the Government suggests that the fact that a warrant has been obtained relieves the police officer of any

responsibility for mistaken judgments about probable cause except for the cases described above, the Government's proposed warrant exception does not address challenges to the execution of the warrant such as one arising from the police officer's failure to read and obey the terms of the warrant.

Measured by a reasonable mistake standard, it is clear that the police conduct executing the warrant in this case was unreasonable and therefore fails to meet even the threshhold requirements of the proposed good faith exception. As Justice Liacos of the Supreme Judicial Court noted, "[t]o take the position that these law enforcement personnel acted in 'good faith' is simply to say that no showing of evil intent has been proved," Commonwealth v. Sheppard, 387 Mass. at 513 (J.A. 65a), but the mere absence of

"evil intent" does not mean that the police were acting in good faith in the sense they could have reasonably believed that their actions were consistent with the requirements of the Fourth Amendment.

The police knew, or unquestionably should have known, the basic requirement of the Fourth Amendment that a warrant must describe with particularity the things to be seized. The detective who was responsible for the preparation of the application for the warrant was an experienced officer who had been on the police force for nineteen years and had been a detective for ten years. He was experienced in the investigation of homicides and was knowledgeable about the procedure for obtaining a search warrant. The other officers who were present at the time were also experienced and, in addition, they were working with

the district attorney and the first assistant district attorney.

The police also knew that the warrant form was not the appropriate one for the search which they intended to conduct and that some modification of the form was required. It was apparent from the face of the warrant that it was intended for use only in narcotics cases, that it was not readily adaptable for use in any other circumstances and that it was particularly unsuited to the search for which the application had been prepared. Detective O'Malley had examined the warrant form and, knowing that it was unsuitable, had made several changes in it, but he did not alter or amend in any way the portion of the warrant form which stated that he had reason to believe that narcotics and related items were being kept at the defendant's home; or the

portion of the form which authorized a search for those items. The police officers' knowledge of the warrant's defects is also clear from the fact that they discussed the deficiency of the warrant with Judge Feeney who confirmed that it was not the proper form.

Finally, the police officers knew or certainly should have known that Judge Feeney had not made any significant changes in the warrant. The police officers and the first assistant district attorney were present when the judge made his perfunctory changes in the warrant. Detective O'Malley, who watched the judge as he changed a few words at the bottom of the warrant, must have seen that the judge had made no substantive changes in the warrant. After the judge had signed the warrant and returned it to them, they had ample opportunity to examine it and

to discover that it was essentially unchanged.

Under these circumstances and with this knowledge or presumed knowledge, the police officers cannot be said to have acted reasonably when they failed even to examine the warrant to insure that the defects had been cured. This is not the conduct that would be expected of a "reasonably well-trained police officer." A reasonably prudent officer would have read the warrant--and read it very carefully--taking special care to see that it was in the proper form.

> ...because everyone knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly.

Commonwealth v. Sheppard, 387 Mass. at 512 n.6 (Liacos, J., concurring) (J.A. 64a). And if, under these circumstances, a "reasonably well-trained police

officer" should have known that this warrant was defective, then Detective O'Malley, a highly experienced police officer, and Mr. Buckley, "a trained and experienced prosecutor," id. at 513, certainly should have known it.

If this kind of conduct is excused--particularly in the circumstances of the instant case--police officers would be invited to disregard the terms of a search warrant, and the warrant would be worthless as a limitation on police conduct.

C. The Violation of the Defendant's Fourth Amendment Rights was Neither Harmless Error Nor Insubstantial.

Both government briefs recognize the serious defect in the search warrant and implicitly acknowledge the inapplicability of a good faith or reasonable mistake claim under the circumstances of this case.[41] But their difficulty in forcing this case to fit into one of the proposed categories of excusable violations of the Fourth Amendment leads them to the equally unsupportable argument that the violation can nevertheless be excused as "harmless

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[41]The Solicitor General admits that the warrant was defective and that "the defect, had it been noticed, would have been obvious to the issuing judge and to the officers as well." Brief for the United States at 67. The state's brief concedes that there was a "technical defect, a negligent error committed by the magistrate in not specifying the items to be seized." Brief for the Petitioner at 25.

error."[42]

The thrust of the government's arguments is not that the error was harmless in the sense that it did not affect the outcome of the defendant's

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[42] The violation of the Fourth Amendment here was not "harmless error" within the meaning of Chapman v. California, 386 U.S. 18, 22 (1967) and Fahey v. Connecticut, 375 U.S. 85, 86 (1963), where the term is used to describe the impact of illegally obtained evidence on the outcome of the trial, not the effect of police action on the underlying Fourth Amendment right. See also, Brown v. United States, 411 U.S. 223 (1973); Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); United States v. Marti, 421 F.2d 1263, 1268-69 (2d Cir. 1970).

The evidence obtained by the illegal search in this case clearly was not "harmless error" in this sense. After reviewing the entire record in this case, the Massachusetts Supreme Judicial Court concluded that the contested evidence had "probative force tending, independently of other evidence, to prove the defendant's guilt and that its admission cannot be upheld on the ground that such admission was harmless beyond a reasonable doubt." Commonwealth v. Sheppard, 387 Mass. 488, 508 n.21 (1983).

trial but that the Fourth Amendment rights asserted by the defendant are unimportant or "insubstantial."[43] The solicitor general argues that the clear failure of the warrant to describe the objects of the search did not "prejudice" the defendant's right to be free from unreasonable searches and seizures and was, therefore, "harmless"

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[43]This formulation is analogous, in substance, to the ALI's Model Code of Pre-Arraignment Procedure, §§290.2 (1975), which provides for supression of evidence "only if the court finds that the violation was substantial, or if otherwise required by the constitution of the United States." The approach of the Model Code has been criticized. See, e.g., Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1048 (1974); Note, The Fourth Amendment Exclusionary Rule: Past, Present and No Future, 12 Am.Crim.L.Rev. 507, 536 (1975). See also, Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga.L.Rev. 1, 34-35 (1975). Because the government arguments are more fundamentally defective, those criticisms need not be repeated here.

because: (1) the police had probable cause to search the defendant's home for evidence of the murder; (2) "the judge thought he was authorizing the police to conduct only the search described in the warrant application"; and (3) the police confined themselves to the search which they believed they had the authority to conduct and did not abuse the authority erroneously given to them by the judge, i.e., they did not search for drugs. Brief for the United States at 67. Accordingly, the Government argues that the absence of a constitutionally valid warrant should simply be ignored. This argument is both factually and legally unsound.

Judge Feeney never found that the police had made a showing that there was probable cause to search the defendant's

home.[44] The trial judge simply concluded that "[t]here was a proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search." (J.A. 35a). Viewed in the light of the record, which shows that there was no finding of probable cause to conduct the search, this ambiguous statement can only be read

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[44] While possibly sufficient to establish probable cause under the standards of Brinegar v. United States, supra, and Illinois v. Gates, supra, the affidavit prepared by Detective O'Malley is particularly sparse in view of the fact that it was prepared with the assistance of the district attorney and the first assistant district attorney. As Judge Feeney was limited under Massachusetts law to consideration of the facts set forth in the affidavit, and was not permitted to rely on the oral statements made by O'Malley when the affidavit was presented, see, Commonwealth v. Monosson, 351 Mass. 327 (1966), it is equally possible that Judge Feeney did not find probable cause to authorize a search for some or all of the items listed in the application.

to mean that the judge considered whether probable cause existed for the search, not that he found probable cause. Nor is there anything in the record to support the assertion that the judge thought he was issuing a warrant for the search described in the application. It is simply wrong to assert on this record that the police acted in accordance with a judicial determination of probable cause in conducting their search.

More fundamental, however, is the government's error in suggesting that a violation of the particularity requirement is "harmless" or "insubstantial" and that the defendant was not in any way "prejudiced" by the failure to comply to with that requirement. This analysis ignores both the language and the history of the Fourth Amendment, see pp. 37-38, supra,

and reduces the warrant requirement to a nullity. A violation of the particularity requirement, a requirement expressly referred to in the Constitution, can never be viewed as trivial. The particularity requirement was designed to insure that searches would be conducted only after prior review of their scope and purpose by a magistrate to make certain that they were fully justified and to provide officers with express guidelines for police actions. See Coolidge v. New Hampshire, supra, 403 U.S. at 467. This was a flagrant violation of the requirement. There was no clear determination of probable cause and no specific limits on the scope of the search.

If the government is allowed to rely on an after the fact examination of the totality of the circumstances not

embodied in the warrant or supporting papers to discover whether there were facts that might have justified a finding of probable cause and the issuance of a properly particularized warrant, there would rarely be a need for the police to secure a warrant.

Moreover, there was prejudice to the defendant which can be measured in several ways. First, the search conducted by a team of Boston Police officers was a substantial intrusion into the privacy of the defendant's home. Second, there was prejudice to the defendant in the sense that the unlawful search led directly to the discovery of the evidence which he sought to suppress. Third, there was prejudice in the sense that the introduction of that evidence may have had an impact on the jury which considered his guilt or

innocence.

The recognition by the Court of a category of harmless or insubstantial violations of the particularity requirement would substantially undermine the deterrent function of the exclusionary rule and the basic protection that the Fourth Amendment provides to be free from arbitrary police searches and seizures. In place of the bright line standards for police and judicial conduct that the Court has sought to establish in the past, see, e.g., United States v. Ross, supra; Dunaway v. New York, 442 U.S. 200, 213-214 (1979); the proposed rule would establish a balancing test in which various factors are weighed. Instead of uniformly applying the constitutional rule that warrants must particularly describe the items to be seized, police,

district attorneys, and magistrates would be invited to weigh whether or not an invasion of a citizen's rights will be "substantial" or merely "technical."

In reviewing these claims on a case-by-case basis, courts will be forced to examine the restraint and understanding of the law enforcement officials, the willfulness of the violations, and the effects of the violations on the understanding of the accused. This will result in "unpredictability and a judicial focus on factual precedent" with the development of case law concerning "substantial" violations which would "further disrupt the already murky body of search and seizure law." Note, The Fourth Amendment Exclusionary Rule: Past, Present and No Future, 12 Am.Crim.L.Rev. 507, 536 (1975).

The adoption of the proposed

substantiality test would also convey to law enforcement officials the message that the courts are not concerned with careful observation by the police of Fourth Amendment requirements and that small violations, even if they recur frequently, will be tolerated. This invitation to carelessness should be rejected. The deterrent objective of the exclusionary rule should not be merely to discourage egregious and deliberate violations; it should also deter negligence on the part of officials. The present rule informs police that the successful performance of their job requires a careful attention to the preservation of a suspect's constitutional rights. The adoption of a substantiality test would erode the incentive to diligence and encourage lax attention to formal procedural safeguards.

The Court should therefore reject the government's proposal to muddy the analytical waters of Fourth Amendment analysis by adding another balancing test that will provide little guidance to the police when making their decisions on how to proceed or to courts when reviewing those decisions. Nor should the Court adopt a standard that invites carelessness on the part of individual officers or that discourages rigorous training on the part of their superiors. While we have argued that such a standard should not be established at all, it surely has no applicability where the express requirements of the Fourth Amendment are concerned.

CONCLUSION

For these reasons, the judgment of the Supreme Judicial Court of Massachusetts in Commonwealth v. Sheppard should be affirmed.

Respectfully submitted,

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